

SEP 16 1989

No. 89-199

JOSEPH P. McANULTY, JR.  
CLERK

---

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

---

ENCO MANUFACTURING COMPANY, INC.,

*Petitioner,*

vs.

CLAMP MANUFACTURING COMPANY, INC.,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**RESPONSE TO SUPPLEMENT TO THE  
PETITION FOR WRIT OF CERTIORARI**

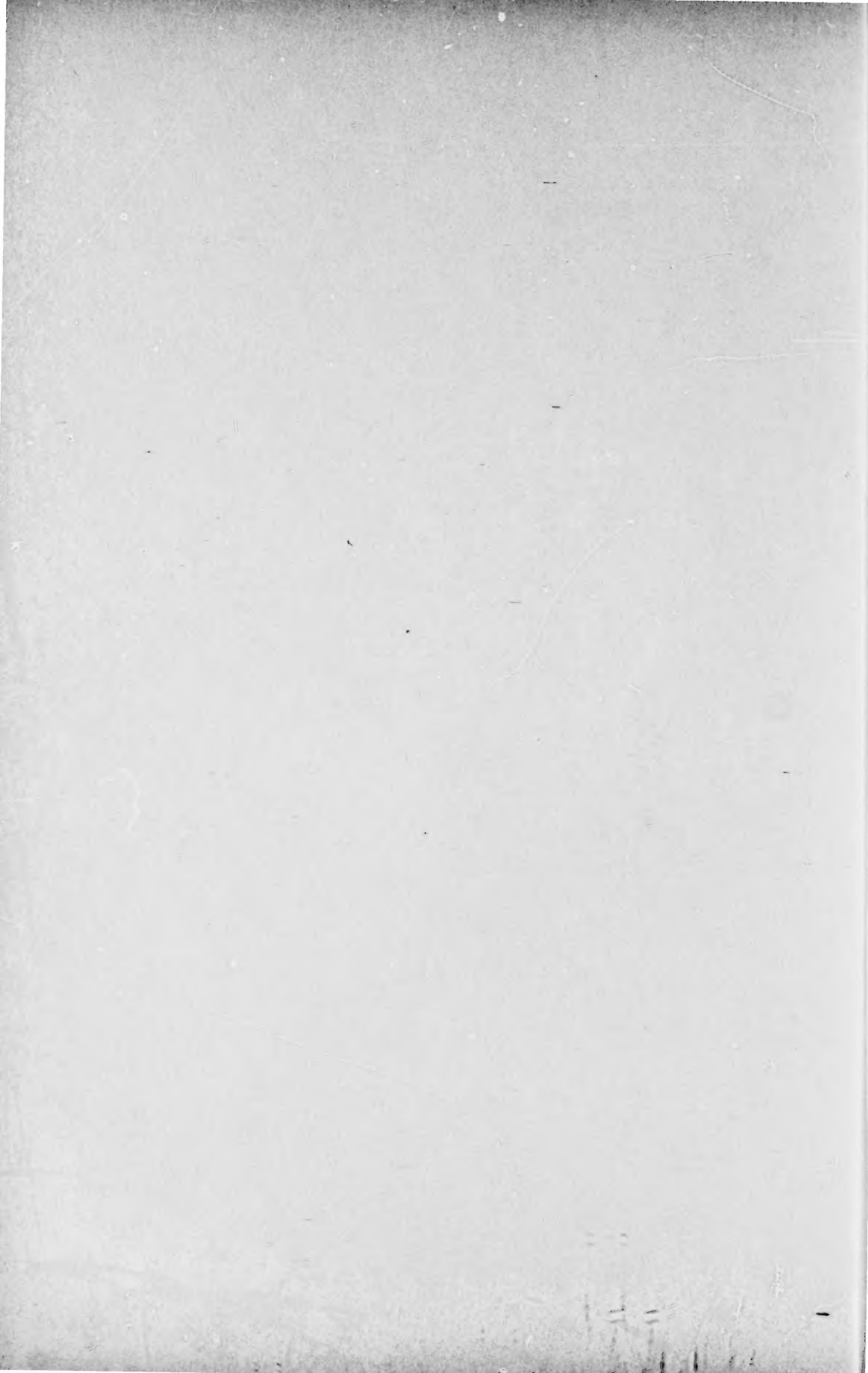
---

ALLAN GABRIEL\*  
RONALD M. St. MARIE  
ERVIN, COHEN & JESSUP

Ninth Floor  
9401 Wilshire Boulevard  
Beverly Hills, California 90212  
(213) 273-6333

\* Counsel of Record

*Attorneys for Respondent*



**TABLE OF CONTENTS**

---

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
RESPONSE TO SUPPLEMENT TO THE PETITION.....	1
CONCLUSION.....	6

TABLE OF AUTHORITIES

---

Cases

Page

Allied Marketing Group, Inc. v.  
CDL Marketing, Inc., No. 88-1747,  
slip op. (5th Cir. July 13, 1989)... 2-5

No. 89-199

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

---

---

ENCO MANUFACTURING COMPANY, INC.,

Petitioner,

vs.

CLAMP MANUFACTURING COMPANY, INC.,

Respondent.

---

---

RESPONSE TO SUPPLEMENT TO THE  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

This response to the Supplement to the Petition for Writ of Certiorari addresses Petitioner's argument that a recent decision of the Fifth Circuit Court of Appeals allegedly reveals a conflict among the Circuits on the Third Question Presented for Review.

THE FIFTH CIRCUIT OPINION CITED BY PETITIONER DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS, BUT SIMPLY PRESENTS A SITUATION, CONTRARY TO THE INSTANT ACTION, WHERE THE TOTAL ABSENCE OF FINDINGS BELOW PRECLUDED APPELLATE REVIEW.

Petitioner claims that the Fifth Circuit decision in Allied Marketing Group, Inc. v. CDL Marketing, Inc., No. 88-1747, slip op. (5th Cir. July 13, 1989) presents a conflict among the Circuits in that the Allied Marketing case allegedly is analogous to the instant action, wherein the Ninth Circuit affirmed the District Court's implied rejection of the laches defense because (1) it had no doubt that the District Court rejected the defense and (2) a full understanding of the issue was ascertainable from the findings entered by the District Court.

However, there is no conflict between the Circuits in that Petitioner's argument

fails to note a crucial distinction between the Allied Marketing case and the Ninth Circuit Opinion. Specifically, in the Allied Marketing case, the Fifth Circuit noted that the failure of the District Court to address certain defenses "impedes our ability to determine whether the District Court erred in its decision to grant a preliminary injunction." (App. 50) In the instant action, the Ninth Circuit concluded that a full understanding of the issue in question was ascertainable from the District Court's findings, which findings did address the relevant factors to the laches defense in question. (Petitioner's App. at p.5) In fact, the Ninth Circuit Opinion recited the District Court's specific findings relevant to the laches defense and made reference to the governing Ninth Circuit

decision setting forth those factors.  
(Petitioner's App. 5-6)

Further, in the Allied Marketing case, the Fifth Circuit noted that the District Court opinion "lacks any indication that the court considered the arguments presented by [the appellant]." (emphasis in original) (App. 54) However, in the instant action, it is beyond dispute that the District Court had considered the arguments presented by Petitioner in connection with its laches defense, given the explicit findings of fact on the factors relevant to the laches defense entered by the District Court. (Petitioner's App. 5-6). Those findings did provide a sufficient basis for appellate review by the Ninth Circuit.

What the Fifth Circuit rejected in its Allied Marketing opinion was Allied's



invitation to evaluate the District Court's decision on the basis of presumed findings of fact and conclusions of law. In the instant action, the Ninth Circuit did not, in the first instance, have to presume any findings of fact, since it was reviewing specific findings on the elements of the laches defense, which findings left the Ninth Circuit with no doubt that the District Court had rejected this defense.

It is clear that appellate review under Rule 52(a), based upon the review of the opinions of the Fifth Circuit in the Allied Marketing case and the Ninth Circuit in the instant action, did not differ from Circuit to Circuit. There simply is no conflict between the Circuits in this regard.

CONCLUSION

For the foregoing reasons, the  
Petition for Writ of Certiorari should be  
denied.

Respectfully submitted,



---

ALLAN GABRIEL, ESQ.  
RONALD M. ST. MARIE, ESQ.  
ERVIN, COHEN & JESSUP  
9401 Wilshire Boulevard  
Ninth Floor  
Beverly Hills, California 90212  
(213) 273-6333  
Attorneys for Respondent





